IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
APRIL 19, 2000, SESSION

STATE OF TENNESSEE v. RITA DAVIS

Direct Appeal from the Circuit Court for Marshall County
No. 13808 Charles Lee, Judge

No. M1999-01281-CCA-R3-CD - Filed September 22, 2000

The defendant, Rita Davis, was convicted of possession of a Schedule II controlled substance with intent to resell. See Tenn. Code Ann. § 39-17-417. The trial court imposed a Range III sentence of 25 years. The defendant was fined $75,000. In this appeal of right, the defendant argues that the trial court erred by failing to grant a motion to suppress; that the evidence was insufficient; that the sentence was excessive; and that the fine was improperly imposed. The judgment of conviction is affirmed. Because the fine was imposed without consideration of relevant factors, the amount is modified to $25,000.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed as Modified.

GARY R. WADE, P.J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, J., joined. JERRY L. SMITH, J., filed a concurring opinion.

Steve McEwen, Mountain City, Tennessee (on appeal), Andrew Jackson Dearing, III, Assistant Public Defender, Fayetteville, Tennessee (at trial and on appeal), for the appellant, Rita Davis.

Paul G. Summers, Attorney General & Reporter, Marvin E. Clements, Jr., Assistant Attorney General, and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On December 3, 1998, Trooper Jimmy Pitts of the Tennessee Highway Patrol received a radio report that the defendant, who was believed to be in a red Ford Escort, was wanted on an arrest warrant for contempt of court. Trooper Pitts stopped the vehicle, which was being driven by the defendant's sister, Linda Perkins. The defendant and a child were also occupants of the vehicle. In two minutes, Lawrenceburg Police Officers Kenneth Hilliard, Chris Casteel, and Robert Johnson arrived at the scene. The defendant stepped out of the front passenger's side of the vehicle. Officer Hilliard read the arrest warrant and informed her that the bail was $1,000, which required $100 cash. The defendant returned to the vehicle and asked Ms. Perkins to hand her a purse from the front passenger's seat. The defendant then directed Ms. Perkins to simply take $100 out of the purse and

deliver it to her. Ms. Perkins did as directed.

As Officer Hilliard escorted the defendant to his patrol car, Officer Casteel took possession of the purse and asked Ms. Perkins to watch him search the purse in case there were any valuables. Officer Casteel found additional cash and a closed, translucent pill bottle in which he found 15 pieces of crack cocaine wrapped individually in aluminum foil. Trooper Pitts, who testified that the defendant was still in the patrol car at the time of the search, recalled that the search took place within five minutes after the arrest.[1] Ms. Perkins stated that the contents of the bottle did not belong to her. Inside the purse was an identification card bearing the defendant's name.

Detective Kevin Clark arrived at the scene after the drugs were found inside the bottle. Detective Clark, who knew the defendant, recognized the bottle as one which the defendant had in her possession on a prior occasion. Detective Clark estimated that each of the wrapped pieces of cocaine could be sold for $20. He estimated that the total value of the cocaine in the pill bottle was $300. The total weight of the cocaine was 2.4 grams.

I

The defendant argues that because she could not return to her vehicle, the rationale for allowing the warrantless search, i.e., the possible danger to the officers, was no longer present. She contends that the area, including the purse, was no longer in her control.

At the conclusion of the suppression hearing, the trial court made the following findings of fact:

> [T]he officers had reasonable grounds to stop the vehicle containing the defendant, having received information from one of their numbers that the defendant was in the vehicle and the officers knew there was an outstanding warrant for the arrest of the defendant which justified the initial stopping of the vehicle.
>
> Upon finding that the defendant was an occupant of the vehicle justified her further detention and subsequent arrest.
>
> The defendant was taken into custody and removed from the automobile and at some point in time prior to leaving the scene of the arrest, the defendant's purse which was inside of the automobile was inspected and there was therein discovered a pill bottle containing the controlled substances.

[1] Officer Casteel testified at the suppression hearing. Because he was unavailable at the time of trial, his testimony at the suppression hearing was read to the jury by agreement.

Warrantless searches and seizures are presumed to be unreasonable. The burden is on the state to establish by a preponderance of the evidence that a warrantless search and seizure falls within one of the recognized exceptions to the warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971). One such exception is the search incident to arrest. The police have authority to search the passenger compartment of a motor vehicle contemporaneous to an arrest. New York v. Belton, 453 U.S. 454, 460 (1981); State v. Watkins, 827 S.W.2d 293, 295-96 (Tenn. 1992). The defendant suggests that the search of a vehicle incident to arrest is not proper when the arrestee has been placed in a patrol car and can no longer access the passenger area of the vehicle. In support of her argument, she cites United States v. Vasey, 834 F.2d 782 (9th Cir. 1987) and State v. Barksdale, 540 A.2d 901 (N.J. Super. Ct. App. Div. 1988). In United States v. White, 871 F.2d 41 (6th Cir. 1989), however, the Sixth Circuit Court of Appeals allowed a warrantless search of the passenger compartment of an automobile as incident to a lawful arrest even though the defendant, sitting in the back seat of a police car, had been restrained and presented no danger to police. Id. at 44. The circumstances of the search in this case are practically indistinguishable from those of the search in White. Furthermore, in State v. Reed, 634 S.W.2d 665 (Tenn. Crim. App. 1982), this court upheld the search of an automobile passenger compartment immediately after the defendant had been placed into a patrol car:

> He did not lose that right by placing Reed in the squad car before conducting the search. In other words, if the officer had the right to search the glove compartment contemporaneously with the arrest of Reed, the search of the interior was allowable even after Reed was neutralized.

Id. at 666.

In our view, the search of a pocket book under the control of the defendant and located on the front passenger side of the vehicle is analogous to the search of the glove compartment in Reed. Because there is no significant factual distinction, the search incident to the defendant's arrest and the seizure of the illegal drugs was lawful.

II

Next, the defendant, who did not testify at trial, argues that the evidence was insufficient to establish that she was either in possession of the controlled substance or that she possessed the controlled substance with the requisite intent to resell. Tenn. Code Ann. § 39-17-417(a)(4) provides as follows:

> (a) It is an offense for a defendant to knowingly:
>
> * * *
>
> (4) Possess a controlled substance with intent to manufacture, deliver or sell such controlled substance.

On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832 (Tenn. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after a review in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405 (Tenn. 1983). This court may neither reweigh nor reevaluate the evidence. Nor may this court substitute its inferences for those drawn by the trier of fact. Liakas v. State, 286 S.W.2d 856 (Tenn. 1956).

Here, the illegal drugs were found in a purse in the passenger's seat of a vehicle owned by the defendant. The defendant had been sitting in the passenger's seat and had just asked her sister to hand her $100 from the contents of the purse. The purse contained a card with the defendant's name on it. From this, the jury could logically infer that the defendant possessed all of the contents of the purse, including the illegal drugs. Because the drugs were individually wrapped and had a total weight of 2.4 grams, the jury could logically infer that they were possessed for resale. Possession of a controlled substance may be either actual or constructive and can be established by proof that the defendant had the ability and intent to exercise control over the drugs. State v. Brown, 823 S.W.2d 576, 579 (Tenn. Crim. App. 1991). In our view, there is a rational basis for the verdict.

III

Next, the defendant questions the propriety of the sentence. The trial court found no mitigating factors and three enhancement factors under Tenn. Code Ann. § 40-35-114:

> (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
>
> (8) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community; and
>
> (13) The felony was committed while on . . . [p]arole.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987). The record in this case demonstrates that the trial court made adequate findings of fact.

The defendant more specifically complains that the trial court erred by failing to find that her criminal conduct neither caused nor threatened serious bodily injury, a factor which might have mitigated the length of the sentence. See Tenn. Code Ann. § 40-35-113(1). The defendant asserts that the trial court erred by concluding that a cocaine offense always threatens serious bodily injury to others. In support of her argument, the defendant cites State v. Clyde Davis, No. 32 (Tenn. Crim. App., at Jackson, Jan. 23, 1991), wherein this court concluded that the defendant, who was arrested with two packets of cocaine weighing 189.9 grams while operating his automobile in Shelby County, did not threaten severe bodily injury. This court pointed out that the jury convicted Davis with intent to sell based upon the amount of cocaine and that there was "absolutely no evidence . . . that the [defendant] sold cocaine to another person or was operating his motor vehicle while under the influence of cocaine." Id.; see also State v. Michael Wayne Henry, No. 02C01-9611-CC-00382 (Tenn. Crim. App., at Jackson, May 29, 1997) (holding that the "neither caused nor threatened serious bodily injury" mitigating factor is applicable unless there is proof that the defendant is a major dealer or is involved in serious drug trafficking or that the conduct relates to serious bodily injury). In State v. Johnny Ray Christman, No. 01C01-9211-CC-00361 (Tenn. Crim. App., at Nashville, Sept. 2, 1993), this court applied the Tenn. Code Ann. § 40-35-113(1) mitigating factor in reviewing the defendant's sentences for two convictions for sale of cocaine because the state was unable to establish any threat of serious bodily injury.

The state points to several cases holding the contrary. For example, in State v. Kenny Cheatham, No. 01C01-9506-CC-00196 (Tenn. Crim. App., at Nashville, Jun. 11, 1996), this court held that the trial court, whose judgment was viewed as presumptively correct, did not err by refusing to apply Tenn. Code Ann. § 40-35-113(1) when the defendant was convicted of conspiracy to sell or deliver cocaine. In Johnny Arwood v. State, No. 335 (Tenn. Crim. App., at Knoxville, May 9, 1991), a sale of 2.5 grams of cocaine was held to have threatened serious bodily injury. In State v. Roger D. Pulley, No. 01C01-9501-CC-00013 (Tenn. Crim. App., at Nashville, Sept. 20, 1995), the trial court found the mitigating factor not applicable because of the large amounts of a dangerous drug.

In our view, the Tenn. Code Ann. § 40-35-113(1) mitigating factor, even if given little weight, should have been applied in this case. There was no proof of any sale. While recognizing that there may be a conflict among the decisions of several panels of this court, it is our view that there was simply no evidence that there was an immediate threat of serious bodily harm in this particular instance. The drugs were simply found in a container in the defendant's purse. The amount of the drugs, while substantial, was not unusually large. There was no indication of use by

any of the occupants of the vehicle. While crack cocaine can present a threat of serious bodily injury, the facts were not sufficiently established for the application of that enhancement factor and, concomitantly, the circumstances suggest no immediate threat in this instance. That, however, does not afford the defendant any relief. The three appropriate enhancement factors weigh heavily, particularly the defendant's prior criminal record, and this mitigating factor would have minimal application.

The defendant has a juvenile record. She was convicted of two separate offenses of passing forged checks while still a juvenile. The defendant's prior record was so extensive that she qualified as a Range III career offender. While five prior felony convictions qualified the defendant as a career offender, the trial court pointed to seven or eight felony convictions in addition to those necessary to establish Range III. She was on parole at the time she committed two of the offenses. Her parole was revoked on two prior occasions. She was on parole at the time of this offense as well. The record includes the following prior convictions:

Date	**County**	**Offense**	**Sentence**
8-7-89	Williamson	Grand Larceny	Six years
8-9-89	Williamson	Forgery less than $200	One year
8-9-89	Williamson	Forgery greater than $200	Three years
7-5-89	Rutherford	Passing a Forged Check	One year
7-5-89	Rutherford	Passing a Forged Instrument Under $200	One year
7-5-89	Rutherford	Obtaining Property by False Pretense	Three years
7-5-89	Rutherford	Petit Larceny	One year
4-17-89	Marshall	Petit Larceny	One year
2-20-91	Marshall	Theft of Property over $1,000	Two years
3-20-91	Marshall	Aggravated Burglary	Ten years
9-27-93	Williamson	Forgery	Six years
9-27-93	Williamson	Forgery	Six years
5-20-94	Rutherford	Theft over $1,000	Three years
5-20-94	Rutherford	Forgery over $1,000	Three years

From all of this, the trial court properly sentenced the defendant to the maximum possible term.

IV

Finally, the defendant asserts that the fine of $75,000 is excessive. Tenn. Code Ann. § 39-17-417(c)(1) provides for a maximum fine of $100,000. In State v. Bryant, 805 S.W.2d 762, 766 (Tenn. 1991), our supreme court ruled that the defendant's ability to pay is a consideration in the imposition of a fine. In this instance, the defendant claims that the amount of the fine is in violation of Article

I, § 16 of the Tennessee Constitution which prohibits excessive fines.

The defendant has appointed counsel. The record indicates that she has no income and no assets. The defendant has been unemployed since May of 1997. She has three children. In State v. Marshall, this court concluded that "an oppressive fine can disrupt future rehabilitation and prevent a defendant from becoming a productive member of society." 870 S.W.2d 532, 542 (Tenn. Crim. App. 1993). This court in Marshall reasoned that "a significant fine is not automatically precluded just because it works a substantial hardship on a defendant–it may be punitive in the same fashion incarceration may be punitive. Given the seriousness of the criminal conduct reflected in the record, the background and social history of the defendant, and the low potential for rehabilitation, we conclude that the $10,000 fine was appropriate." Id.

Here, the trial court classified the defendant as a professional criminal, one who did not work for her money and instead committed crimes for personal financial gain.

It is evident in this case that the defendant has little ability to pay. On the positive side, the defendant, who did not complete high school, has a Graduate Equivalent Diploma. She has three children, ages 13, 9, and 3. The children do not reside with the defendant, however, and the defendant does not appear to have been providing support for them. Her mother and sister provide primary care for the children. The defendant has never been married. The defendant's employment history is practically non-existent. She worked as a waitress for five months from the last part of 1992 to early 1993. Otherwise, she has worked no more than nine days at any one job. She has delinquent telephone bills and court fines.

A fine of $75,000, in the context of an obvious inability to pay, warrants some modification. In our view, a fine of $25,000 is sufficiently punitive.

Accordingly, the judgment and sentence are affirmed. The fine is modified to $25,000.

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GARY R. WADE, PRESIDING JUDGE